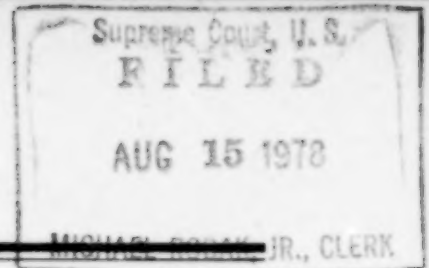


No. 77-1686



In the Supreme Court of the United States
OCTOBER TERM, 1978

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. B) are reported at 570 F.2d 881. The district court's findings of fact and conclusions of law (Pet. App. A) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1977, and a petition for rehearing with

a suggestion of rehearing *en banc* was denied on February 28, 1977. The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States reserved a right of access to even-numbered sections of land when it granted the Union Pacific Railroad title to odd-numbered sections completely surrounding the retained even-numbered sections.

STATUTES INVOLVED

Sections 3 and 4 of the Act of July 1, 1862, 12 Stat. 492; the Act of July 2, 1864, Section 4, 13 Stat. 358; and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, as amended, 43 U.S.C. 1061-1066, are reprinted in Pet. App. C.

STATEMENT

Petitioners, the owners of certain odd-numbered sections of land in Carbon County, Wyoming, brought this action against the United States and several of its officers for declaratory and injunctive relief under the Quiet Title Act, 28 U.S.C. (Supp. V) 2409a (Pet. 3-4). These odd-numbered sections, which were originally granted by Congress to the Union Pacific Railroad in 1862, alternate in a checkerboard fashion with the even-numbered sections of land that were retained

in the public domain (Pet. App. ii).¹ Petitioners use the even-numbered publicly owned sections for grazing and pasture pursuant to permits issued under Section 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b (*ibid.*).

In 1938, the Bureau of Reclamation built the Seminoe Reservoir on public lands to the west and south of petitioners' lands, and the reservoir and adjacent public lands have been used by the public for hunting and fishing down through the years (Pet. App. vii). In recent years, however, the government began to receive complaints that the public was being denied access to the reservoir area or being required to pay for such access (*ibid.*). Because of the checkerboard pattern of private and public land holdings, it is impossible to reach the reservoir from this direction without crossing some corner of privately owned land (see the map at Pet. App. xviii).

The Department of the Interior attempted to negotiate with the private landowners to secure public access to the reservoir (Pet. App. vii-viii). When these negotiations failed, Interior decided to improve and partially relocate an existing dirt road in the area in order to provide public access to the reservoir from a nearby public highway (Pet. App. viii). In late 1973, the Bureau of Land Management began to "blade" (that is, clear the vegetation from) this road, which was located wholly within the even-num-

¹ A map of the area is reprinted at Pet. App. xviii.

bered sections of public domain except at two points where it crossed the corners of petitioners' sections as they joined the interlocking public sections (Pet. App. viii-ix, xviii).

Petitioners then brought this quiet title action, contending that the United States had unlawfully entered their property by clearing a pathway across their land at the section corners (Pet. App. vi). The United States in response acknowledged clearing the path and claimed it had the legal right to do so (*ibid.*). Both sides stipulated the facts and moved for summary judgment (Pet. App. vi-vii).

The district court held that the United States had not reserved or obtained any easement or other right to cross petitioners' lands for access to the reservoir, and it granted summary judgment for petitioners (Pet. App. iv-v).

The court of appeals reversed (Pet. App. vi-xx). It held that the 1862 congressional grant of the odd-numbered sections to petitioners' predecessor in interest, the railroad, contained an implied reservation of an easement "to permit access to the even-numbered sections which were surrounded by lands granted the railroad" (Pet. App. xi). Judge Barrett dissented (Pet. App. xix-xx). The court denied a petition for rehearing with a suggestion of rehearing *en banc* in a brief opinion, rejecting petitioners' contentions that the issue of an implied reservation had not been properly raised, or that it presented an issue of fact on which the trial court should conduct an evidentiary hearing (Pet. App. xxvi-xxvii).

ARGUMENT

The decision of the court of appeals is correct, it does not conflict with the decisions of this Court or of any court of appeals, and there is no reason for review by this Court.

1. Petitioners contend (Pet. 9-14) that the court of appeals erred in concluding that Congress impliedly reserved a right of access to the even-numbered sections when it granted the odd-numbered sections to the Union Pacific Railroad.

The Act of July 1, 1862, 12 Stat. 489, 492, as amended by the Act of July 2, 1864, 13 Stat. 356, 358, granted to the Union Pacific Railroad the odd-numbered sections of public land for 20 miles on both sides of the railroad that the Union Pacific was to construct. As the court of appeals recognized (Pet. App. x), a legislative grant of public lands is a law as well as a conveyance, and it must be interpreted so as to carry out the intent of Congress. *Missouri, Kan. and Tex. Ry. v. Kansas Pac. Ry.*, 97 U.S. 491, 497; *Schulenberg v. Harriman*, 21 Wall. 44, 62. It is well settled that when grants of federal land are at issue, any doubts "are resolved for the Government, not against it." *Andrus v. Charlestone Stone Products Co., Inc.*, No. 77-380, decided May 31, 1978 (slip op. 13); *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116.

The court of appeals correctly recognized (Pet. App. x-xi) that in making land grants to railroads, Congress intended not only to aid in the construction of the railroad by providing land, but also to encourage

the settlement, development, and eventual sale of the remaining public domain lands. In speaking of the grant Acts involved here, this Court stated in *United States v. Union Pacific R.R. Co.*, 91 U.S. 72, 80:

Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased

* * *

Since Congress made these grants with the intention of promoting the settlement and development of the areas through which the railroads would pass, the court of appeals concluded that Congress did not intend that the retained even-numbered sections of public lands should be made inaccessible and their development thwarted, rather than encouraged, by the grants (Pet. App. xi). Without a right of access, the retained lands would have been rendered virtually useless to anyone but the owner of the surrounding odd-numbered sections.² If Congress reserved no right

² In contrast, the railroad and its grantees could develop the odd-numbered sections without a similar impediment because of the well-established federal policy of acquiescing in

of access, it "not only granted the railroad the odd-numbered sections, but also granted the railroad the exclusive use of the even-numbered sections" (*ibid.*). The court concluded that this had not been the intent of Congress (*ibid.*).³

2. Petitioners contend, however, that the court of appeals erred in construing the statute without remanding the case for an evidentiary hearing on the question of Congress's intent, in considering legislative intent without first identifying some specific ambiguity in the legislation, and in concluding, in petitioners' words, that Congress "*must* have intended to reserve an easement" for access to the retained public lands (Pet. 14-15). These contentions are without merit.

a. An evidentiary hearing is not a prerequisite to judicial consideration of materials bearing on legis-

the location of public highways on and across public lands. Section 8 of the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. (1970 ed.) 932, which provided that "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted," was "a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government." *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 473. The acquisition of rights of way over public lands for a variety of purposes is now governed by Title V of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2776-2782.

³ At least two early state cases reached similar results. See *Herrin v. Sieben*, 46 Mont. 226, 127 Pac. 323; *Jastro v. Francis*, 24 N.M. 127, 172 Pac. 1139, error dismissed, 249 U.S. 581. Contra, *Anthony Wilkinson Live Stock Co. v. McIlquham*, 14 Wyo. 209, 83 Pac. 364.

lative intent, such as prior judicial interpretations or legislative materials such as committee reports. Petitioners were free to direct the court of appeals' attention to any such materials, and the record contains no support for their contention (Pet. 15) that the court "disallowed consideration of legislative and administrative history." Indeed, as the court of appeals noted (Pet. App. xxvii), petitioners first suggested that an evidentiary hearing was necessary in their petition for rehearing, after they suffered an adverse ruling on the question of law.

Moreover, petitioners do not dispute the court's conclusion that a major purpose of the grants in question was the development and settlement of the retained public lands, nor do they dispute that lack of a right of access would have thwarted that goal. Even now, petitioners do not identify any materials in the legislative history that they believe the court of appeals overlooked.⁴

b. Petitioners also err in suggesting that before giving any consideration to legislative intent, the court was obliged to identify some specific "ambiguity

⁴ *Amici* Union Pacific Land Resources Corporation and Santa Fe Pacific Railroad Company suggest (Br. in Support of Petition, p. 10) that Congress "specifically considered and rejected a proposed reservation that would have allowed public entry onto the granted lands for limited purposes," citing Cong. Globe, 37th Cong., 2d Sess. 1909-1910 (1862). The proposed amendment referred to in this part of the debates did not concern the right of the public to pass across the granted lands to reach the public domain, but rather the public right to mine any valuable minerals discovered on the granted lands.

in the legislative pronouncement" (Pet. 14). This Court has repeatedly stated that no rule of law prohibits resort to an available aid in statutory construction, no matter how clear on its face the statute may appear to be. *E.g.*, *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10; *Cass v. United States*, 417 U.S. 72, 77-79.

c. Nor is there merit to petitioners' objection to the court of appeals' common sense conclusion that in view of the legislative aim of the grant, "Congress by implication intended to reserve an easement to permit access to the even-numbered sections * * *," since "[t]o hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which in our view would be unwarranted" (Pet. App. xi). It is axiomatic that a statute should not be construed to produce an absurd or unreasonable result. *E.g.*, *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543; *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459. This Court recently applied similar common sense reasoning in concluding that although water may be both valuable and a mineral in the literal sense, it is not a "valuable mineral" within the intent of the 1872 federal mining law. *Andrus v. Charlestone Stone Products Co., Inc.*, *supra* (slip op. 5-7).

3. Petitioners also err in contending (Pet. 11-15) that the court of appeals' decision misconstrues and contravenes numerous decisions of this Court.

a. Petitioners urge (Pet. 11-12) that the court of appeals' reliance on *Camfield v. United States*, 167 U.S. 518, and *Buford v. Houtz*, 133 U.S. 320, was misplaced, since neither held that the United States had an easement or a right to build a public road across private lands.

The court of appeals did not suggest that these cases expressly held that Congress intended to reserve an easement in the railroad land grants. As its discussion demonstrates (Pet. App. xi-xiii), the court was well aware of the facts of each case, and it correctly concluded that these cases upheld a right of public access to the public domain, even at the expense of some intrusion on the adjacent privately owned sections. Accordingly, as the court concluded, they support its interpretation of the 1862 grant.

In *Camfield*,⁵ landowners who were successors in

⁵ *Camfield* was decided under the Unlawful Inclosures of Public Lands Act, 23 Stat. 321, 43 U.S.C. 1061 *et seq.* Section 3 of this 1885 enactment provides in pertinent part (43 U.S.C. 1063):

No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct * * * free passage or transit over or through the public lands * * *.

As the court of appeals noted (Pet. App. xvi), the Act evidences legislative recognition of the implied reservation in the earlier railroad grants. By its terms, the statute creates no new rights or interests in lands. Rather, it was designed as remedial legislation to protect rights that Congress had earlier reserved from being defeated by fencing, inclosing, or other means. As this Court has recognized, such subsequent legislation may elucidate the intent of an earlier statute. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 380-381.

title to the odd-numbered sections of land originally granted by Congress to the Union Pacific Railroad had constructed a fence on their own property that enclosed a checkerboard area consisting of sections of public domain as well as their own sections. 167 U.S. at 520. In upholding an order to remove the fence—even though it was constructed entirely on private land—the Court's reasoning closely resembled that of the court of appeals in this case (167 U.S. at 526):

We are not convinced by the argument of counsel for the railway company, who was permitted to file a brief in this case, that the fact that a fence, built in the manner indicated, will operate incidentally or indirectly to enclose public lands, is a necessary result, which Congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining the even ones as public lands; and that if such a result inures to the damage of the United States it must be ascribed to their improvidence and carelessness in so surveying and laying off the public lands, that the portion sold and granted by the Government cannot be enclosed by the purchasers without embracing also in such enclosure the alternate sections reserved by the United States. Carried to its logical conclusion, the inference is that, because Congress chose to aid in the construction of these railroads by donating to them all the odd-numbered sections within certain limits, it thereby intended incidentally to grant them the use for an indefinite time of all the even-numbered sections. It seems but an ill return for the generosity of the Government in granting these roads half its lands to

claim that it thereby incidentally granted them the benefit of the whole.^[6]

Petitioners here did not erect a fence around the perimeter of their checkerboard land holdings, but their refusal to allow access over any corner of their land in order to reach the interlocking sections of public domain operates effectively as an enclosure of those public lands. As the court of appeals pointed out in *Mackay v. Uinta Development Co.*, 219 Fed. 116, 118 (C.A. 8), in upholding the right of sheepherders to cross private lands when passing from summer to winter range:

The odd-numbered sections touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, *all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.* [Emphasis added.]

This Court reached a similar result in *Buford v. Houtz*, *supra*, where it held that sheepherders with

⁶ Compare the Court's dictum, *id.* at 527-528.

an implied license to graze their herds on public lands would not be enjoined from trailing their herds across the checkerboard sections of private lands as well.

b. Petitioners also contend (Pet. 13-14) that the court of appeals' decision conflicts with a line of cases in this Court "protecting title security and patent defensibility." There is no conflict with cases such as *Smelting Co. v. Kemp*, 104 U.S. 636, and *Burke v. Southern Pacific Railroad Co.*, 234 U.S. 669. Those cases hold that a federal patent may not be attacked by a showing of irregularities or improprieties in the proceedings leading to its issuance. Nothing of the sort is at issue here.

4. Finally, petitioners suggest (Pet. 7-9) that the decision in this case will unsettle or cloud title to all lands originally granted to the railroads, as well as other lands granted for the construction of roads, canals, and other improvements. They contend that the present decision recognizes easements, "on behalf of lands no longer in public ownership and for benefit of any conceivable activity" (Pet. 8-9), regardless of the development or use of the burdened lands. To the contrary, the court of appeals' decision is a limited one, recognizing only a reasonable right of access across the section corners of privately owned grant lands to reach the interlocking sections of public domain.⁷ The status of this right of access once a system

⁷ Similarly, a private grantor's intent to reserve an easement by necessity for ingress and egress may be inferred where he retains lands that can be reached only by crossing lands

of public roads has been established in the area to provide access, and once the odd and even-numbered sections have been developed, divided, and conveyed to a variety of purchasers, is not at issue here. Since an implied easement normally terminates when its purpose is accomplished, and may also be terminated by other means, many of the factual situations petitioners posit may well be distinguishable from this case. See 3 Powell, *The Law of Real Property* ¶¶ 422, 421-426 (Rev. ed. 1977).⁸

Moreover, the facts set forth in the petition itself put petitioners' parade of horrors in perspective. This is not an often-recurring issue. As petitioners themselves point out, millions of acres of land were granted to the railroads in the nineteenth century (Pet. 8), much of this land has been settled and developed extensively, and yet there is little precedent on the point at issue here. It appears that few conflicts of this nature have arisen.

granted to a third party. 3 Powell, *The Law of Real Property* ¶ 410 (Rev. ed. 1977).

⁸ See *Camfield v. United States*, *supra*, 167 U.S. at 528 (dictum).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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